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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~707~~ 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

No. ~~707~~ 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1947

Nos. 60 & 61

LA CROSSE TELEPHONE CORPORATION,

Petitioner and Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON,

Defendants and Appellants

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,

Petitioner and Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD,

Defendants and Appellants

STATEMENT OF APPELLEE AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Nature of Decision of Wisconsin Supreme Court

The appellants' statements as to jurisdiction have not fully and accurately described the nature of the ruling of

the Wisconsin Supreme Court from which appeal is taken, nor the nature of the contentions made by the appellee before the state court. The Wisconsin Supreme Court reversed a decision of a lower court, which was to the effect that the Wisconsin Employment Relations Board was precluded by the constitution from conducting an election to determine desires of employees of a local telephone corporation with respect to a collective bargaining representative even though the National Labor Relations Board had never taken any action involving the company or its employees, and even though the election did not contravene any substantive provision of the National Labor Relations Act nor any policy fixed by the National Labor Relations Board. In submitting to the state supreme court the issue of whether such ruling was correct, the appellee asked:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of a local telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the state board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

It was not contended by the appellee (because it was not necessary for purposes of his case), nor was it held by the state supreme court that the question could or should be answered with an unqualified negative. The supreme court decided, in accordance with the appellee's contentions, that the question could not be answered with an unqualified affirmative as the trial court had done. The gist of the Wisconsin Supreme Court's decision is that the state board is not precluded from conducting an election among em-

ployees of a local telephone company to determine their desires as to a bargaining agent when the National Labor Relations Board has never taken any jurisdiction whatever of the relations between the employer and its employees and when there is no showing of conflict with provisions or policies of the national act.

Facts*

As the Supreme Court of the United States pointed out in *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board* (1942), 315 U. S. 740, 746-747, 62 S. Ct. 820, 86 L. Ed. 1154, it is not concerned with theoretical disputes or anticipated controversies, but with specific issues; and so it confines its consideration to the precise facts of the case before it rather than to attempt adjudication of the validity of other types of action which might arise in other cases. The court there said that it was "not under the necessity of treating the state Act as an inseparable whole"; but for purposes of a particular case must read the state act "as though it contained only those provisions which authorize the state Board" to take the particular type of action which it did take.

Under the foregoing rule, the facts which must be considered are:

The Telephone Guild of Wisconsin (hereinafter referred to as the Guild) petitioned the Wisconsin Employment Relations Board (hereinafter referred to as the State Board) to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation (hereinafter referred to as the Company or the Employer) as to a bargaining representative. The State Board conducted an investigation, including a hearing, to determine whether the cir-

* Page references are to the record and appendix before the Wisconsin Supreme Court.

cumstances warranted invocation of its services, although such preliminary hearing and investigation are not expressly required by state statute.

The Company had been bargaining for a number of years previously with the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (hereinafter referred to as Local B-953) on behalf of employees in its plant and traffic departments.

After the hearing the State Board conducted an election among all the Company's employees, in which the plant and traffic department employees voted to bargain together as in the past, and voted overwhelmingly in favor of the Guild as a bargaining representative. (The vote in favor of the Guild was 91 against and only 14 for Local B-953) (R. 61, pp. 32-34; A-Ap. 121-124). The Board entered no order, but certified as a fact the results of this election.

The National Labor Relations Board has never at any time taken any jurisdiction with respect to either the Company or its employees. It has made no finding that any unfair practice or question of representation arising between such employer and its employees affects commerce.

There has been no conflict in the application of the Wisconsin law with either a substantive provision of an act of Congress or any policy formed by the National Labor Relations Board.

The State Board did not attempt to exercise any discretion respecting the bargaining unit, but merely conducted a vote to ascertain the wishes of the employees. The bargaining unit selected by the employees is entirely consistent with provisions of the national law and with policies followed by the National Board thereunder. (If there are any provisions of the Wisconsin statutes which might be applied, as to wholly intrastate enterprises, in

a manner different from that in which the National Act might be applied, the State Act makes provision under sec. 111.17 for severability so that provisions of the law which cannot be applied in a particular case do not prevent the application of other portions of the state law.)

The employer is a Wisconsin corporation, all of whose employees work within the boundaries of the state. Its primary function is to operate a local telephone service. There is nothing in the record made before the State Board to indicate that the Company engages in interstate service. Allegations to that effect were made in the petition for review, but allegations of fact in the petition for review are not part of the record which may be considered by state courts upon review. The only evidence relating to the source of the company's revenues which is properly in the record arose in the Supreme Court when the State Board called the attention of the Court (in accordance with the rules of judicial notice applicable in the state as illustrated in *Chicago & N. W. R. Co.* v. *Railroad Commission*, (1914) 156 Wis. 47, 145 N. W. 216, 974) to the last annual report filed by the employer with the State Public Service Commission, stating under oath that all of the employer's revenue was derived from intrastate service. The mere fact that the Company is subject to regulation by the State Public Service Commission demonstrates that it conducts an intrastate service of great importance to the people within the state.

We have no doubt that it also participates to some extent in interstate toll communication service although the extent of interstate commerce is to be proven rather than presumed, since its regulation lies in a delegated field. Whether the extent of interstate service of a primarily intrastate enterprise is sufficient to warrant the

finding necessary to assumption of jurisdiction by the National Board under the National Act is a question of fact which that Board must determine in each case. That is, where a question of representation does not actually arise *in* commerce, the National Board must determine as a fact whether it is of such moment that it threatens to obstruct commerce. As the Wisconsin Supreme Court has pointed out in its decision in the instant case, the National Board is not required to accept jurisdiction or exercise its powers on every petition or complaint filed with it because "Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce." That proposition is well illustrated in this case. The National Board did not take jurisdiction of the petition for election filed with it, and so it has never made the finding necessary to invoke application of the National Act.

As this Court pointed out in *Alabama State Federation of Labor* v. *McAdory,* (1945) 325 U.S. 450, 464, 65 S. Ct. 1384, 89 L. Ed. 1725:

> "• • • The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce *and are found to be such by the National Labor Relations Board.* • • •" (Emphasis supplied).

The fact in this case is that neither the National Labor Relations Act nor its successor has ever been applied to relations of the employer and employees here involved; and the National Board has never made any finding necessary to the application of those acts.

Argument

While it is the strong conviction of the appellee that the action here involved, even if it were legally enforcible, would not interfere with Congressional regulation of interstate commerce nor infringe upon any constitutional rights, we will not argue the merits of that position at this time. This argument will be restricted to jurisdictional points. Appeal will not lie in this case for two reasons: (1) The action appealed from is not a final judgment in the sense of making a final disposition of the rights of the parties. (2) The parties seeking appeal are not adversely affected by the action.

It requires no citation of authority to support the proposition that only final determinations are appealable to the United States Supreme Court. A merely practical order preparatory to a final hearing, by which the rights of the parties are not affected, is not a final order so as to be appealable. *Pulliam* v. *Christian*, (1848) 47 U.S. 209, 6 Howard 209, 12 L. Ed. 409. Where the decree involved is merely interlocutory in nature no appeal will lie to the United States Supreme Court even though state laws allow it to be appealed to the state appellate courts. *Reddall* v. *Bryan*, (1860) 65 U.S. 420, 24 Howard 420, 16 L. Ed. 740.

In support of the other jurisdictional proposition involved we cite *Alabama State Federation of Labor* v. *McAdory*, (1945) 325 U.S. 450, 463, 65 S. Ct. 1384, 89 L. Ed. 1725, in which the United States Supreme Court said:

> "* * * Only those to whom a statute applies *and who are adversely affected by it* can draw in question its constitutional validity in a declaratory judgment proceeding *as in any other.* * * *" (Emphasis supplied)

The court also said in *Voeller* v. *Neilston Warehouse Co.*, (1941) 311 U.S. 531, 537, 61 S. Ct. 376, 85 L. Ed. 322:

> "* * * Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. * * *"

Doubtless these rules arise from the fundamental proposition enunciated in *Faitoute Iron & Steel Co.* v. *Asbury Park*, (1942) 316 U.S. 502, 62 S. Ct. 1129, 86 L. Ed. 1629, that the constitution was "'intended to preserve practical and substantial rights, not to maintain theories.'"

In determining the nature of the action of which review is sought by the United States Supreme Court, we must look to the construction placed upon it by the supreme court of the state. As pointed out in *Hotel & R. E. I. Alliance* v. *Wis. E. R. Board*, (1942) 315 U.S. 437, 440, 62 S. Ct. 706, 86 L. Ed. 946, the question of the restraints, if any, imposed upon the parties "is for the Wisconsin Supreme Court to determine." The legal effect of the certification by the State Board of the results of an election conducted by it was termed by the State Court as "mere fact-finding procedure." No one can be aggrieved in the legal sense by a mere finding of fact which has no compulsory effect.

This viewpoint accords with the rulings of the Federal courts respecting certifications of the results of elections made by the National Board. Such certifications under the National Labor Relations Act were not even reviewable. *American Federation of Labor* v. *National L. R. Board* (1940), 308 U. S. 401, 60 S. Ct. 300, 305, 84 L. Ed. 347. While similar action of the State Board is made reviewable in

Wisconsin courts, that is the result of legislative policy rather than of constitutional necessity. As pointed out in *Reddall* v. *Byran* (1860), 65 U. S. 420, 24 Howard 420, 16 L. Ed. 740, a statute making action reviewable in state courts has no effect upon the jurisdiction of the Federal courts.

Federal courts have regularly held that elections and certification proceedings by the National Board are of a nonadversary, fact-finding character. See, for instance, the cases cited in *United R. & W. D. S. E. of A.* v. *Wisconsin E. R. Board* (1944), 245 Wis. 636, 641, 15 N. W. 2d 844:

> "* * * To the acts of the board in ordering and conducting and certifying the result of a referendum there is applicable, by analogy, the court's statement in *Southern S. S. Co. v. National Labor Relations Board* (3d Cir.), 120 Fed. (2d) 505, 506—
>
> "'A certification proceeding is of a nonadversary, fact-finding character in which the board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation.'
>
> "See also *National Labor Relations Board* v. *Botany Worsted Mills* (3d Cir.), 133 Fed. (2d) 876, 882, in respect to an investigation preliminary to an election, to wit:
>
> "'The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation.'"

The State Board's action was ministerial in character, somewhat similar to the action of general election officials who conduct elections and canvass their results. Such functions do not involve an exercise of discretion on the part of the officials. See, for instance:

Brockett v. *Maxwell* (1946), 38 S. E. 2d 176, 178, 73 Ga. App. 663;

Bourgeois v. *Fairchild* (1903), 33 So. 495, 496, 81 Miss. 708;

State ex inf. Anderson ex rel. Booth v. *Moss* (1915), 172 S.W. 1180, 1181, 187 Mo. App. 151;

State ex rel. Caldwell v. *McQueen* (1942), 159 S.W. 2d 436, 438, 178 Tenn. 478;

People ex rel. Griffith v. *Bundy* (1941), 109 P. 2d 261, 263, 264, 107 Colo. 102;

State ex rel. Donnell v. *Osburn* (1941), 147 S.W. 2d 1065, 1068, 1069, 347 Mo. 469, 136 A.L.R. 667.

The Wisconsin Supreme Court has pointed out that the State Board's action which is under consideration on these appeals does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act:

> "The mere fact-finding procedure of the state board in the ascertainment of facts, and its thereupon ordering and conducting an election and certifying the result thereof constitutes an action in merely its ministerial capacity. * * *"

The appellants urge that the board's action was not ministerial because it made a determination of the status of a contract between the employer and Local B-953, during its investigation to determine whether an election should be held. It exercised no discretion in making such a determination, since it was obligated to apply the rules of law prevailing in this state. Such rules, according to *Ogden* v. *Saunders*, 25 U. S. 213, 12 Wheat. 213, 6 L. Ed. 606, necessarily govern the nature, requisites and validity of a contract made in this state. The board correctly applied such rules, as is demonstrated by the decision of the Wisconsin Supreme Court. It was pointed out in *Stevens* v. *Jones*

(1909), 123 N. W. 705, 708, 24 S. D. 97, that an action is no less ministerial because the person obligated to perform the act must first satisfy himself of the existence of the state of facts upon which the duty arises.

The certification of the results of an election conducted by the state board is merely the furnishing of information to parties who are presumably interested. The knowledge of such facts should assist them in their negotiations.

The certification is not made legally enforcible, perhaps for the reason that in at least nine cases out of ten no enforcement is needed. When parties know the facts, they can act accordingly. The certification serves only the purpose of acquainting them with the facts.

Before any legally enforcible action could be taken on the basis of a certification of the results of an election, additional proceedings would be necessary with the usual concomitants of notice, and hearing. The certification of the fact of the employee's wishes, therefore, is nothing more than an intermediate step without legal force.

The appellants have not shown, nor could they show, that they have been prejudiced or adversely affected by the certification. Although the certification was issued January 14, 1947, the appellants have ever since refused to recognize it without any adverse effect upon themselves. (No stay of execution was applied for or issued because no enforcement is possible.) Surely that fact in itself demonstrates that the appellants could not be prejudiced by a mere certification of the results of an election among the employees. If the knowledge of the desires of the employees has prejudiced the employer and the rejected organization, the prejudice is surely not to their constitutional rights. If anyone has been deprived of constitutional rights, or rights sought to be protected by Federal legisla-

tion, it has not been the appellants but the 91 employees whose choice of an agent has been frustrated by them.

Respectfully submitted,

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